

## RAWLS'S CONSTITUTION-CENTERED PROPOSITIONS ON LEGITIMACY: A FRIENDLY INTERROGATION

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draft of work in progress

### General note for NYU readers

The material that follows pulls together doubts I have been nursing about John Rawls's seeming placement of constitutional law at the load-bearing center of his proposed "liberal principle of legitimacy." Rawls meant by "legitimacy" in politics a morally valued condition in which citizens, reasonably perceiving a need, for everyone's sake, for a high average level of expected compliance with law by everyone, can rightfully demand of each other that they do their parts toward sustaining this crucial bond of social cooperation.

But, how, then, to justify to supposedly free and equal dissenters the coercive effects of laws imposed by democratic majorities? Rawls's principle of legitimacy responds as follows:

Political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason.

In the work from which this draft is drawn, I follow Rawls sympathetically a good part of the way. Accepting the basic outlook of political liberalism, I see his question as aptly posed. I accept also the proceduralistic form of Rawls's proposed solution—that is, its deflection of disagreement over ground-level political outcomes to a hoped-for wide agreement on (or wide agreeability of) an overarching political system or practice from which the potentially divisive outcomes issue.

My doubts have specifically to do with Rawls's seeming reduction, for this purpose, of the "system" (the procedure) to a body of constitutional law in force and institutional arrangements for securing compliance. ("Seeming reduction," because writings of Rawls postdating his postulations of the constitution-centered legitimacy principle may be read as a move away from any such reduction. This work of mine may accordingly be construed as an offering of some reasons why.) I believe we cannot hope to reduce a legitimation-bearing political practice to any set of semi-abstract scriptural norms whose institutionally decisive applications inevitably will reinscribe the disagreements the abstractions are meant to overcome. Constitutional-legal bills of rights and constitutional judiciaries to decide their authoritative applications may (or may not) be *parts of* a political practice we can judge legitimation-bearing overall. What they cannot be is the whole or the end of it. Systemic justification cannot be teetering at the brink whenever a supreme court erroneously applies a constitution's scheme of guaranteed rights and liberties, or does so in ways that leave many citizens reasonably doubting that the scheme as thus applied could be part of a constitution that reasonable and rational citizens have reason to endorse.

I hope the ramble that follows below may adequately clarify whatever in what I've just said may be murky or puzzling. For this particular occasion, I have thought it fitting to let the ramble steer into some vintage Dworkiniana and also to start it off by posing an apparent issue between Rawls and Lawrence Sager, about constitutional law's receptivity to norms imposing on the state a responsibility for the active pursuit of the conditions of social justice.

I have drawn passages in what follows from a few recent and pending publications, not all of which are cited here. You will have no trouble seeing that this is all very much (as we like to say) a "work in progress."

## I. PRELUDE: JUDICIALLY UNDERENFORCED CONSTITUTIONAL NORMS?

1. Official word from the American Supreme Court—echoed also in many a jurisconsultative text and treatise—pronounces our *corpus juris constitutionalis* void of any norm obliging the state to bestir itself actively in the pursuit of social justice.<sup>1</sup> Lawrence Sager says, though, that if you watch what the Supreme Court *does* (not just what it says), you will see clear traces there of the presence in our constitutional law of a “durable . . . commitment to social justice.”<sup>2</sup> Now, when Sager says “commitment,” he means not just some bit of preambular honking<sup>3</sup> but an actual obligation *of law*, owed by each and every branch of our constituted governmental system—the Congress, the Executive, the Supreme Court, their counterpart bodies in the states—to make prevention and correction of “structural injustice” a constant, leading aim in their respective daily operations.<sup>4</sup>

2. Sager differs interestingly from UT-Austin colleagues who, rather than insisting on its presence, instead lament what they see as a recent evacuation (“forgetting”) from our law of any such obligation.<sup>5</sup> That obligation exists there *now*, Sager claims, as an “unacknowledged” but still detectably operative norm of American constitutional law. Sager’s resulting complaint is not that the norm has gone missing, but is rather (implicitly) that relevant actors do not sufficiently admit to its presence and govern their conduct accordingly.

3. Stuff of law though it be, Sager’s constitutional social-justice obligation breaks the Hohfeldian mold. It amounts, in effect, to a continuing demand on every American governmental body to embed its every consequential exertion—from charting agendas and general orders, to resolutions on guiding principles or policies, to specific acts of legislation and

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<sup>1</sup> See, e.g., *Deshaney v. Dept of Soc. Serv.*, 489 U.S. 189, 196 (1989) (“Our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. . . . Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference, . . . it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.”).

<sup>2</sup> Lawrence Sager, “The Unacknowledged Constitution” 7 (2017), available at <https://docs.google.com/document/d/1S8jYqI210aIApk7AzHtuVkbBOoR-r4Yg8I0E9nx0cOo/edit?usp=sharing>. Professor Sager has this paper in circulation as a draft for discussion, and has kindly agreed to my use of it here.

<sup>3</sup> See U.S. CONST. preamble (“ . . . in order to establish justice . . .”).

<sup>4</sup> Sager, *supra*, at 8-10.

<sup>5</sup> See Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, and the Constitution of Opportunity*, in NOMOS LVIII: WEALTH 45, 53-57 (Jack Knight & Melissa Schwartzberg, eds., 2017) (describing, explaining, and deploring a mid-twentieth century “great forgetting” of a formerly vibrant American “language of constitutional political economy”).

administration—in conscientious consideration of the social-justice impacts of choices made and options forgone. Such an obligation is not of the type giving rise to individual constitutional rights, at least not directly. Its “correlative” on the demand side of the normative equation (as Hohfeld might have it) is not anyone’s entitlement or claim-right (or privilege or immunity or power), but rather a social ideal of normatively constrained political deliberation or public reason.<sup>6</sup>

That leaves an obvious question of how the judicial branch fits into the picture, to which Sager is fully alert. There is “of necessity,” he says,

a division of labor here. Courts address explicit and direct denials of specific rights; legislatures have to do the work of addressing structural injustice, because the obligation is too porous for the judiciary to fulfill: What targets are best and appropriate? What machinery will be efficacious? What level or levels of government should assume what part of the burden?<sup>7</sup>

Sager’s constitutional social-justice commitment accordingly comes complete with instruction that our courts are *not*, for its sake, to be tasked with, or on their own to venture into, forms of judicial oversight and action out of keeping with standard American notions (“justiciability,” “remedies”) of a bounded judicial power.<sup>8</sup> But still he says the commitment is an observably operative norm in the *corpus juris* to which our judges show themselves beholden. He makes an intriguing case, of which a sample comes soon below.

4. Sager’s putative constitutional-legal commitment is to the prevention and cure of “structural injustice.” And what is that? Partly, at least, it is a cultural condition: in Sager’s words, the persistence in our social life of “patterns of diminished membership . . . within which some persons [defined by race, gender, religion and sexual orientation] are systematically regarded and treated as less worthy by many other members of the community.”<sup>9</sup> What about economy-based, entrenched stratifications of class, which others on the American liberal left would have us also learn (or relearn) to see as offenses to the Constitution?<sup>10</sup> On the evidence

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<sup>6</sup> John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 767-69 (1997) (hereinafter cited as Rawls, *Public Reason*) (defining an “ideal of public reason” that officials and citizens satisfy by supplying justice-regarding or social-regarding explanations for support of political positions affecting “constitutional essentials and matters of basic justice”).

<sup>7</sup> Sager *supra* n. 2, at 9.

<sup>8</sup> See *id.* at 8-9.

<sup>9</sup> *Id.* at 14.

<sup>10</sup> See Fishkin & Forbath, *supra* n. 5, at 46-47 (recalling a history of American constitutional debates over questions of oligarchy, class, and opportunity).

of prior writing, Sager would concur.<sup>11</sup> His American constitutional social-justice commitment, then, would correspond in substance with a standard of rightness for a liberal society’s basic-structural arrangements that John Rawls names as “background justice.”<sup>12</sup>

5. I do not mention Rawls idly. Had Sager been marching squarely in the footsteps of Rawls, he might have thought to characterize the social-justice commitment as not, in the main, a norm of law at all, but rather a norm of American political public reason, by which lawmakers and administrators are held to account by forces in a working democracy operating mainly outside of courts (although also occasionally in them). That will not do for Sager, though. His project is Copernican, Newtonian. His aim is to show how the thesis of the commitment’s presence *now* in the material form of *law* can explain some persisting apparent anomalies in the practice of a Court for which law provides the sole confessable ground for action.

6. One example will suffice for our purposes. We see the Supreme Court standing ready to bar as unconstitutional a state legislature’s repeal of an antidiscrimination law (say, prohibiting private refusals to hire on grounds of sexual orientation) that the Court would have deemed itself quite powerless to order enacted in the first place<sup>13</sup>—no doubt in part for the very reasons noticed by Sager.<sup>14</sup> We struggle to explain this seeming anomaly (“How does a return to . . . a constitutionally benign state of affairs turn into a violation of the Equal Protection Clause?”<sup>15</sup>). But if you just think of a Court acting in response to the Constitution’s invisibly inked social-justice norm—including that norm’s confirmation of the limits of the judicial power—the mystery evaporates. Viewed (as Sager explains) against the backdrop of that norm,

state public accommodation [and other antidiscrimination] laws are properly understood to be legislative judgments in response to a crucial constitutional obligation to undo structural injustice. They are of the same constitutional material as judicial decisions undertaking to enforce the Constitution,

and so a court does not act extrajudicially merely by negating their peremptory withdrawal.<sup>16</sup>

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<sup>11</sup> See LAWRENCE G. SAGER, *JUSTICE IN PLAIN CLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004).

<sup>12</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 265-69 (paper ed. 1996) (hereinafter cited as *RAWLS, LIBERALISM*) (“The role of the institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations takes place.”).

<sup>13</sup> Compare *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>14</sup> See above para 3.

<sup>15</sup> Sager, *supra* n. 2, at 3.

<sup>16</sup> *Id.* at 10.

7. Now plainly, for the social-justice commitment to be doing such work as that, we will have to find it sitting at a high enough level in our legal firmament to be always potentially controlling over acts and policies of even our highest-ranking constituted legislative, executive, and judicial powers. Sager accordingly locates it in the Constitution. He treats it, in effect, as an instance of a class he has elsewhere named as “judicially underenforced constitutional norms.”<sup>17</sup>

One may nevertheless ask whether the Constitution is the right location for Sager’s putative higher norm of law. A possible alternative conception is after all easily available. We could see the social-justice norm as sitting in a legal-hierarchical space outside and above the Constitution. We could see it then as directed both to the shaping of constitutional law (which might not, however, for reasons we’ve begun to note, be suited to containing the whole or the crux of it), and also—by its own direct force and without mediation through constitutional law—to the shaping of infra-constitutional, “ordinary” law. (Suggestions that the whole of American law is itself thus beholden to some pre-constitutional American legal-normative deposit are not exactly foreign to our tradition.<sup>18</sup>) The immediate legal force of the social-justice norm would thus carry over past the Constitution. It would hit directly—not just mediately, through the Constitution—on ordinary-level legislative deliberations. It would hit them as law, but judicially underenforced.

8. Well okay, you might say, that is an available alternative construction, but what advantage might it have over simply absorbing into the Constitution the legal-obligational side of the American commitment to the pursuit of social justice? My answer is: Sager’s putative legal norm works its explanatory magic only through its special combination of a mandated governmental pursuit with a proviso that questions of compliance will not normally be for courts of law to decide.

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<sup>17</sup> See Lawrence Sager, *Material Rights, Underenforcement, and the Adjudication Thesis*, 90 B.U.L. REV. 579, 580 (2020) (“judicially underenforced constitutional rights”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

<sup>18</sup> See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution*, 27 STAN. L. REV. 703, 715-16 (1975) (reporting original understanding that the Constitution does not completely codify the higher-law principles that are legally binding here); Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation*, 111 PENN. ST. L. REV. 413, 417 (2006) (reporting views of some abolitionists that “the Declaration [of Independence] abolished slavery or at least rendered it unconstitutional for the federal government to support slavery”). Strang further documents invocations of the Declaration as “an independent source of [legally] binding constitutional principles” by 19th-century suffragists, see *id.* at 422-23, and by 20th-century right-to-life advocates, see *id.* at 427, 430-31.

I make no general objection (as some others might) to a classification as “law” of a mandate thus trimmed and shorn of full adjudicative backing.<sup>19</sup> The possible problem comes, though, with a certain account of a special function for—specifically—*constitutional* law in a liberal state. The account I have in mind has behind it no lesser an authority than John Rawls (accompanied also, as I will later on suggest, by Ronald Dworkin<sup>20</sup>). On that Rawlsian account, to which I am about to turn for extended examination, it seems that—whatever we might say of law in general—there can be no place in *constitutional* law for a norm deemed “crucial” but also nonjusticiable.<sup>21</sup>

If and to the extent we thus find Sager and Rawls at odds. I do not say the upshot must be a critique of Sager. It might rather be a critique (or, as I shall rather suggest, a rereading) of Rawls.

## II. “THE LIBERAL PRINCIPLE OF LEGITIMACY”

### The Problem of Political Liberalism

9. I tread now myself in the steps of Rawls. We work from within the public culture of constitutional democracy. We read that culture through a moral-contractual lens, as liberalism’s modern historical quest for fair basic terms of social cooperation (read also “just background conditions”) for populations of citizens conceived as free and equal.<sup>22</sup>

The puzzle, though, is: How does that quest not end up in self-blockade? Political liberalism, a recently theorized branch of the historical culture marked by special sensitivity to the challenge posed to that quest by conditions of cultural and moral diversity, confronts us with the following problem: Given liberal professions of respect and regard for the equal moral freedom and responsibility of persons, how can we hope to justify societal demands (themselves no doubt morally inspired<sup>23</sup>) for everyone’s accommodation of their projects and activities to

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<sup>19</sup> See Frank I. Michelman, *Socioeconomic rights in constitutional law: Explaining America away*, 6 INT’L J. CON. LAW 663, 666-67, 684-85 (2008) (noting while declining to adopt a possible objection of that kind).

<sup>20</sup> See below para 30 & n. 55

<sup>21</sup> See above para 3.

<sup>22</sup> See above para 4 & n. 12. For a nutshell version, see JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 18-19 (Erin Kelly ed., 2001) (hereinafter cited as RAWLS, RESTATEMENT) (connecting a “fundamental” political idea of persons as each endowed with “moral powers” to “have, to revise, and rationally to pursue a conception of the good” and to “understand and . . . act from . . . principles of justice” to a fundamental political idea of society as a fair scheme of social cooperation among persons thus endowed).

<sup>23</sup> See below para 26.

requirements of state law, including demands they may find insupportable (i) on grounds moral, philosophical, or religious, that are (ii) sincerely, responsibly, and respectably held?

Near the start of *Political Liberalism*, John Rawls poses the question to which his work there will be addressed. “How is it possible,” Rawls asks, “that there may exist over time a stable and just society of free and equal citizens profoundly divided” not just by interests but by “religious, philosophical, and moral doctrines?” Rawls calls that “*the* problem of political liberalism.”<sup>24</sup> He then immediately follows with what he sees as the same question “put another way.” How is it possible, he now inquires, “that deeply opposed though reasonable [religious, philosophical, and moral] doctrines may live together and all affirm the political conception of *a constitutional regime*?”<sup>25</sup>

### Enter the constitution

10. Thus seeking a possible practice of legal ordering that can be both stable and just in a diverse modern society, we find Rawls advancing by way of solution the idea of a “constitutional regime.” And then asking again about how democratic majorities can hope to justify the coercive effects of their laws on dissenters no less presumptively entitled than they are to respect as free and equal citizens, Rawls proposes as follows:

Citizens legitimately exercise . . . coercive political power over one another . . . only when [the power] is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason.<sup>26</sup>

Rawls calls that “the liberal principle of legitimacy.” “Legitimacy” thus names, for Rawls (and will for us throughout this paper), a morally valued condition in which citizens, reasonably perceiving a need, for everyone’s sake, for a high average level of expected compliance with law by everyone,<sup>27</sup> can rightfully demand of each other that they do their parts toward sustaining this crucial bond of social cooperation.

11. Among most or all readers of this, it will go practically without saying that a general willingness of citizens at large to comply in normal course with duly issued ordinary

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<sup>24</sup> RAWLS, *LIBERALISM*, *supra* n. 12, at xx (emphasis supplied).

<sup>25</sup> *Id.* (emphasis supplied)

<sup>26</sup> The formulation just above is found in RAWLS, *RESTATEMENT*, *supra* n. 22, at 41. It differs in some details from formulations in RAWLS, *LIBERALISM*, *supra* n. 12, at 137, 217, but not in any respect with which I will here be concerned.

<sup>27</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 211 (rev. ed. 1999) (hereinafter cited as RAWLS, *JUSTICE*) (presenting “Hobbes’s thesis”) (“It is reasonable to assume that even in a well-ordered society the coercive powers of government are necessary for the stability of social cooperation.”).

laws—most of the citizens, most of the laws, most of the time—is a socially necessary good. But of course we also know that groups of us are at any time liable to disagree deeply and intractably (in real political time) over the rightness and goodness of some of a state’s policies as adopted and pursued by law. How, then, do we sustain across our populations a justified sense of assurance that our political regime continues as a whole to be deserving of support, even in spite of your or my severe disapproval of some of the turns it takes or choices it makes from time to time?

One answer would be: by a credible establishment in the public space of a widely agreeable test for the regime’s continued wide acceptability overall, despite recurrent severe dissatisfactions with some of its substantive operations, here and there in the population. It would have to be a test that those who accept it can furthermore conscientiously see their way clear to deeming acceptable to everyone for whose acceptance they have good moral reason to care—say, everyone deemed “reasonable.” Then each citizen could point to and cite this test to the others in good conscience—each treating the others as equals in dignity and freedom—as a basis for reciprocating demands for a general disposition to comply with duly issued laws. According to the Rawlsian principle of legitimacy, a chief and crucial function of constitutional law is to serve as such a test for a modern, broadly speaking liberal society.

12. We can see pretty well what “reasonable,” here, must mean. We fall back on a set of perceptions that everyone supposedly could and should share: a perception, *first*, of the very great moral and practical benefits to everyone of having some decent system of law effectively in force; a perception, *second*, of the persisting facts of conflicts of interests and value-laden disagreements that might be tolerably understandable on all sides; and then a perception, *third*, of the commanding moral logic of a reciprocity of respect for *everyone’s* quest—yours no less than mine, a woman’s no less than a man’s, a Muslim’s no less than a Christian’s, a worker’s no less than a boss’s, and so on—for a life lived in dignity, according to aims and values that a person affirms for herself or himself in conditions of freedom.

13. With that set of perceptions on board, we then posit the possibility of a set of constitutional laws for the country that meets the following condition: Each citizen can look the others in the eye and say, everyone here who shares it should be able to see also that a system constituted by *just these* basic laws—here pointing not only to the constitution’s political-structural arrangements but also its bill of substantive rights—is sufficiently worth upholding to give each of us prevailing reason to insist on each other’s acceptance (in civic practice, not in ultimate moral judgment) of whatever issues from the system. So when someone takes exception to a given policy to be carried out by law, we can feel ourselves morally entitled to

respond that the law or policy in question might be right or it might be wrong, it might be just or it might be unjust, but *it is not outside the constitution* and so it is in good moral order for us to call on you for compliance with it.

14. Now, obviously, not just any constitution that may happen to be in force in a given country at a given time can be allowed to shoulder, in that way, the burden of justification of the force of ordinary law. It will have to be what we can call a *legitimation-worthy* constitution (compare: a sea-worthy ship)—meaning a constitution possessed of whatever the property is that we think can qualify for such a service a body of basic or constitutional laws. A Nazi constitution would not, by the lights of my readers, meet this requirement. In his proposed principle of legitimacy, John Rawls describes the requisite property in terms of the constitution’s acceptability for such a service, in view of its essential content, to all reasonable and rational, free and equal citizens.

Legitimacy as a deflection of procedure. “Legitimation-by-constitution”

15. Rawls’s constitution-centered proposition on legitimacy chimes neatly with the strain of proceduralism that courses through his political philosophy from *A Theory of Justice* onward.<sup>28</sup> We have, let us say, a group of persons who prefer or who have no choice but to stick together rather than go their separate ways. In the philosophy of Rawls, “society” (within a given territory) names such a group.<sup>29</sup> Faced with intractable disagreements about questions that could force their unity apart (do these laws or these policies merit the respect or rather the contempt of a right-thinking person?), the members find they still can agree on a deflection to a different question (are these laws or these policies constitutional?), for which they expect a publicly certifiable answer to be more readily at hand.

That deflection is what I mean by a procedure. The initial question is what we label the “substance” of the disagreement. The substitute question then is the “procedure” the group accepts for getting past it.<sup>30</sup> (A group of re-unioning friends above all committed to spending the day together decide by coin-flip between the beach and the ball game.) In the Rawlsian procedural proposition on legitimacy—which I’ve sometimes a bit flippantly called by the name

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<sup>28</sup> See RAWLS, JUSTICE, *supra* n. 27, at 172-74 (“In the case of a constitution . . . [the] best attainable scheme is of one of imperfect procedural justice”).

<sup>29</sup> See *id.* at 109-112 (on “the circumstances of justice”).

<sup>30</sup> See Frank I. Michelman, *Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary*, 47 U.C.L.A. L. REV. 1221, 1234-36 (2000) (explaining this sense of procedure and its application to problems of legal controversy).

of “legitimation-by-constitution”<sup>31</sup>— *the constitution* serves, in that sense, as the stipulation of the terms of a procedure.

That does not mean, though, that the terms are themselves all and only about political processes (we vote and the majority rules) as opposed to political outcomes (abridgements of the freedom of speech are disallowed). Compliance with certain outcome-constraining norms can constitute a part of the procedural (deflected-to) substitute for the primary question on which agreement simply is not to be had. So it is with Rawls. His “constitutional essentials” comprise not only provisions for “the . . . structure of government and the political process” but also for “equal basic rights and liberties of citizenship that legislative majorities are to respect.”<sup>32</sup>

“Constitution” as normal-form positive law in Rawls’s proposition on legitimacy

16. When Rawls says “constitution” in his proposition on legitimacy, he has in view a body of *laws* within a country’s positive-legal system and practice. Context makes that clear beyond a possibility of doubt.<sup>33</sup> He means laws that are (i) basic, differing in that respect from some other laws in the system, but that also, in common with all other proper such laws, are (ii) scriptural, (iii) ascertainable, and (iv) institutionally settleable (with apologies for that ungainly coinage).

“Basic” means the laws of the constitution (or at any rate the parts that count as “essentials” in Rawls’s proposition on legitimacy) set terms of recognition for any and all further legal operations of the state—including most importantly the issuance of directly operative laws by the everyday legislative bodies. (In Hartian terms, these laws set the system’s highest-order

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<sup>31</sup> See Frank I. Michelman, *Legitimacy, The Social Turn and Constitutional Review: What Political Liberalism Suggests*, 3 CRIT. Q. FOR LEGISLATION & LAW 183, 185 (2015).

<sup>32</sup> RAWLS, LIBERALISM, *supra* n. 12, at 227. See RAWLS, JUSTICE, *supra* n. 27, at 173 (“The political system . . . would not be a just procedure if it did not incorporate [liberty of conscience, freedom of thought, liberty of the person, and equal political rights].”). Compare RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 24-26 (1996), where Dworkin proposes, as the point of substantive constitutional law, the establishment of basic-structural conditions for imbuing all citizens with a warranted sense of full “moral membership” in the collectively self-governing political community, by which each can “treat himself as bound together with others in a joint effort to resolve [political] question, even when his views lose”).

<sup>33</sup> In *Political Liberalism*, Lecture VI, §§ 2, 5, 6, Rawls, in the following order, lays down the constitution-centered principle of legitimacy; defines the constitutional essentials; remarks that he speaks of “a constitutional regime with judicial review;” endorses the idea of constitutional democracy as legally “dualist,” sustaining both a “higher law of the people” and an “ordinary law of legislative bodies;” and calls the supreme court an “institutional device[] to protect the higher law.”

There is room for argument that Rawls at some point *after* uttering the liberal principle of legitimacy (in *Political Liberalism* and *Justice as Fairness*) moved away from thus tethering the moral justification of the force of state law to compliance with the terms of a positive-legal constitution, see Silje A. Langvatn, *Legitimate, but unjust; just, but illegitimate: Rawls on political legitimacy*, 42 PHIL. & SOC. CRIT. 132 (2015). My concern just now is with the principle of legitimacy as uttered in those two works. I will take up below the thought that Rawls may later have come to a different view.

secondary rules.) “Scriptural” means that everyone can point to one and the same set of words, one and the same collation of canonical prescriptive sentences—fixed (so to speak) in the public space—and agree that *that* is what is presently and for some indefinite future to count as is this country’s set of constitutional essentials. “Ascertainable” means that correct applications of the essentials “is more or less visible on [their] face” and will only rarely be “open to wide differences of reasonable opinion.”<sup>34</sup> “Institutionally settleable” means that a designated institutional body’s answers to interpretative questions carry the force of law unless and until duly institutionally revised.

These elements—of the objectivity, fixity, ascertainability, and institutional resolvability of constitutional norms—would seem to be already implied by the idea of these norms as law within a positive legal order. What is more to our point here, though, is how—as a moment’s reflection will confirm—they seem to be implied by the very idea that *constitutionality* is to serve as a *procedural* test of legitimacy.

### III. RAWLS VERSUS SAGER (?)

#### Rawls’s resulting exclusion of full background justice from legitimation-bearing constitutional law

17. A procedural deflection for getting past ground-level divisions must have as its premise that questions of compliance with the procedure are an order of magnitude less open to reasonable public disagreement than are the ground-level questions themselves, or at any rate are that much more amenable to trusted institutional resolution. Primarily for that reason, Rawls excludes anything like Sager’s commitment to a stand against structural injustice from load-bearing work in his constitution-centered proposition on legitimacy.

“Principles [of justice] covering the basic freedoms and those covering social and economic inequalities” play different but roles, writes Rawls, in the basic structure of a just society. The role of the former is to “specif[y] and secure[] citizens’ equal basic liberties and institute[] just political procedures,” while the role of the latter is to “set[] up the background institutions of social and economic justice appropriate to citizens as free and equal.”<sup>35</sup> The roles are “complementary,” Rawls says, but they differ decisively in ascertainability:

Whether the . . . essentials covering the basic freedoms are satisfied is visible on the face of constitutional arrangements and how these can be seen to work in practice. But whether the

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<sup>34</sup> RAWLS, LIBERALISM, *supra* n. 12, at 229 (explaining why a general obligation of pursuit of social justice is not a constitutional essential); see below para 18.

<sup>35</sup> RAWLS, LIBERALISM, *supra* n. 27, at 229.

aims of the principles covering social and economic inequalities are realized is far more difficult to ascertain. These matters are nearly always open to wide differences of reasonable opinion; they rest on complicated inferences and intuitive judgments that require us to assess complex social and economic information about topics poorly understood.<sup>36</sup> Thus . . . we can expect more agreement about whether the principles for social and economic justice are realized.<sup>37</sup>

And “these considerations,” Rawls then concludes, “explain why freedom of movement and free choice of occupation and a social minimum covering citizens’ basic needs count as constitutional essentials,” while a wider principle of the pursuit of background justice does not.<sup>38</sup>

For completeness, I must note that “these considerations” include, for Rawls, the additional thought that, in the pursuit of legitimacy, constitutional-legal assurance in regard to the basic freedoms is “more urgent” than in regard to the social and economic conditions of background justice. Why so? Because (so runs the thought) “so long as there is firm agreement on [the former] and . . . political procedures are reasonably regarded as fair, willing cooperation”—including in the continuing quest for the conditions of background justice—“can normally be maintained.”<sup>39</sup> I nevertheless say that perceived differences of ascertainability are the primary and decisive consideration for where Rawls draws the line on the essentials of a legitimation-worthy constitution, because without those difference there would be no reason to exclude any guarantee that Rawls would regard as truly and fully a principle of justice for a liberal society.

18. But why, you might ask, should difficulties of ascertainment of compliance with a guarantee exclude that guarantee from the terms of a constitutional-legal test for legitimacy, when that test stands to be applied by a trusted institutional decider? Granted, potentially divisive disagreements over ground-level laws and policies cannot be overcome by a resort to abstractly stated “constitutional essentials” on which all can agree, but only because they paper over the persisting disagreements that inevitably will surface at the point of application of those essentials to concrete policies and actions. It does not follow, though, that citizens must always agree in the first person (so to speak) about the finally correct answers to questions of fulfillment of the constitutional essentials. Citizens might instead find it reasonable to defer to an institutional service whose considered judgments regarding such questions are widely trusted to fall within the bounds of honest, discursive defensibility—not, of course, infallibly but with

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<sup>36</sup> Compare Sager’s comments on “division of labor,” above para 3.

<sup>37</sup> RAWLS, *LIBERALISM*, *supra* n. 12, at 229-30.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 230. Not all liberal-minded thinkers concur. See TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT AND REFORM* (2016).

a frequency sufficient to qualify those judgments as publicly authoritative for legitimacy-sustaining purposes. And indeed it is precisely with a view to this crucial moral function—to assist in the enablement of political legitimacy on liberal terms—that Rawls himself defends the use of courts as authoritative public arbiters of the fulfillment of the constitutional essentials.

But from that very conception of the Supreme Court’s service “as the highest judicial interpreter of the constitution” flows a limit on the allowable scope of reasonable debatability of questions of compliance with the legitimacy-bearing constitutional essentials. For that service requires a supposition of public confidence that

the political conceptions judges hold and their views of the constitutional essentials locate the central range of the basic freedoms in more or less the same place. In these cases at least its decisions succeed in settling the most fundamental political questions.<sup>40</sup>

All told, then, we have to understand Rawls as concluding that a constitutional guarantee of sufficient dedication in the pursuit of the social and economic conditions of background justice cannot stand up to that prerequisite for full public trust in the Supreme Court.<sup>41</sup>

19. This is a result that many, including Lawrence Sager, will find hard to take—some of us for reasons we learn from Rawls. In order to meet the Rawlsian test for legitimation-worthiness, a political order should include a commitment affecting every topic for which a rational and reasonable person would reasonably seek one as a fair condition for willing support for the system as a whole. Now, can we reasonably call on everyone as free and equal to submit their fates to the tender mercies of a democratic-majoritarian lawmaking system, without also committing our society credibly, from the start, to run itself in ways designed to constitute and sustain every person as a competent and respected contributor to political exchange and contestation as well as to social and economic life at large? If not, then a commitment to the pursuit of background justice should be salient in the publicly acknowledged basic terms of the lawmaking system with whose outputs everyone is called upon to comply. Any expression of the morally requisite systemic commitment will be justifiably suspect if we begrudge it full expression in the social form that begets the maximum civic backing the country’s political

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<sup>40</sup> Id. at 237.

<sup>41</sup> I have dealt with this aspect more expansively elsewhere. See Michelman, *supra* n. 19, at 683-84 (explaining a widely held concern that “writing or reading socioeconomic assurances into constitutional law would run risks of serious damage to the integrity (and to public confidence therein) of the country’s practices of constitutionalism[and] legality . . . upon which political legitimacy depends”).

culture is able to muster. It would seem to be a premise for Sager and others that that form, in our country now, for better or for worse, is constitutional law.<sup>42</sup>

### B. Reconciliation?

20. It looks as though that brings Sager up against Rawls, at least to some extent. But to what extent, exactly? The two agree that a commitment to the pursuit of background justice is a requirement for a society aspiring to a fully just condition. They agree on a need, even so (and also for the sake of justice), to defer to a perception of nonjusticiability-at-the-core of a guaranty of sufficient dedication in the pursuit of background justice. The difference is only that Sager points out how the guarantee is still justiciable around the edges. So why not (we might imagine Larry asking Jack) include it as an essential for any liberally legitimation-worthy constitution, just up to and not beyond the edge of nonjusticiability?

That will not do. If public confidence in the adjudicative calling out and correction of breaches of essentials itself is to count (para 18) as a kind of secondary procedural prerequisite of legitimacy, then either sufficiency of dedication would have to be justiciable *at the core* (not just around the edges), or else it cannot be a Rawlsian constitutional essential.

But Rawls and Sager could still agree, could they not, on including sufficiency of dedication as a judicially underenforced part of constitutional law, *only not counting it as a part on which legitimacy depends?* And isn't that, then, the respect in which we might see Sager as offering a friendly improvement to Rawls?

Well, that is a question to Sager, not to me. He speaks of a "crucial" constitutional obligation to undo structural injustice.<sup>43</sup> But *crucial to what?* is now the question. Crucial, no doubt, to the pursuit of justice full and true. But does Sager mean also crucial (even) to *legitimacy*, the condition (as Rawls puts it) in which "willing compliance can normally [but Rawls here also means "justly," in an extended sense of that term] be maintained." If so, then Sager looks to be on a collision course with Rawls.

But I take these two to be friends who would rather not run each other over, so it looks like one of them will have to veer. I count myself a friend to both, and I am going to suggest it should be Rawls who veers. It is not only Sager's implicit challenge that so inclines me. Sager is figuring for me here as the canary in the Rawlsian depths, his chirp a signal that something in the air may be amiss.

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<sup>42</sup> The same view is also very strongly manifest in the work of Fishkin & Forbath, *supra* n. 5.

<sup>43</sup> See above para 6.

#### IV. SOME CONSEQUENCES OF LEGITIMATION “BY CONSTITUTION”

21. Justification of divisive ground-level political acts by appeal to the legitimation-worthiness of an overall political system or practice from which they issue is what we may call an idea of “legitimation by system.” “Legitimation by constitution” then stands for a variation on that theme, by which “the system” that is to bear the justificatory load—the system, that is, on the perceived legitimation-worthiness of which will depend the moral justification for a reciprocity of demands for respectful submission to laws issuing from it—is reduced to a body of positive-legal material, the “constitutional essentials.” We have just been examining into one consequence of such a reduction, to wit, a resulting resistance against writing into constitutional law an active state obligation to the prevention and cure of structural injustice. In the sections that follow below, I take up some other apparent consequences.

##### A duality of aims for substantive constitutional law

22. A first and general consequence, affecting others to follow, is a duality in the kinds of aims with which societies like ours may invest the substantive parts of their basic-law constitutions, which I will here name as a “regulatory” and a “justificational” aim. (Of course this dual classification does not in itself conjure up the full and rich array of reasons and motives that theorists and observers may find for the introduction into a country’s legal practice of a layer of substantive constitutional law.<sup>44</sup> The classification only sorts out these sundry possible aims along one axis of differentiation among them.)

The regulatory function of a constitutional bill of rights is to constrain political outcomes over a span of time in directions preselected by the authors (whom we may or may not idealize as “the people”). The justificational function is to provide for everyone concerned a good and sufficient reason right now, in the present moment, for willing submission to the laws that issue from everyday lawmaking, which may run strongly against the interests or beliefs, including moral beliefs deeply held, of substantial numbers of citizens.

23. The “liberal principle of legitimacy” propounded by Rawls assigns a justificational function to substantive constitutional law. Yet it seems that whoever makes that assignment must be assigning a regulatory function, too. Justificational force presupposes regulatory effect. Justification says (roughly speaking): “Yes, we have disagreements, but still we all can (and

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<sup>44</sup> See, e.g., RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 43-47 (2004) (advancing a “hegemonic preservation” thesis to explain constitutionalization of substantive rights); Dieter Grimm, *Integration by Constitution*, 3 INT’L J. CONST. L. 193, 195 (2005) (advancing the thesis of an expressively “integrative” function for substantive constitutional law).

therefore should) go along with the legislative outputs of the legal order in force—*given that* (which is to say, *just insofar as*) we have assurance that those outputs do in fact issue in conformity to certain instructions pre-inscribed in *this* constitution (to which we are just now pointing).”

From this, it may seem we can expect that the regulatory and justificational functions of a substantive constitution will coincide, so that pursuit of latter must also involve a pursuit of the former. On closer look, though, one finds that by loading the justificational (or legitimation) function on top of the regulatory, we set up puzzles of execution of constitutional responsibilities by judges, lawmakers, and citizens.

A puzzle of citizen responsibility. “Civility” as political obligation

24. Suppose a constitution has clauses on “liberty,” “equal protection,” “free exercise” and “non-establishment” of religion. The country debates whether that combination (plus Preamble) adds up to (i) a constitutional ban against exclusion of same-sex couples from state-sanctioned marriage plus (ii) putting elected county clerks to a choice between keeping their jobs and conscientiously refusing to make themselves party (by official signature) to the facilitation of gay marriages. At the moment, no competent authority having spoken to the contrary, these matters remain within the keeping of the ordinary legislative bodies to decide in whatever ways they may choose. Next week, though (let’s say), the country will be voting on a proposed constitutional amendment that would specifically prohibit any law or other official action conditioning access to marriage on the genders of the partners. You as citizen have a vote to cast. And you, as it happens, subscribe to a liberal moral conception that treats as falling within the scope of fundamental human rights a person’s freedom of choice of a marital partner regardless of sex. Might the idea of a justification-bearing constitution nevertheless point you toward leaving open for some while longer the question of the permissibility of legislative restrictions on same-sex marriage—and thus toward a “no” vote from you on your country’s pending constitutional amendment?

25. A constitution’s justificational function succeeds, when it does, as a procedural deflection from ground-level issues subject to reasonable but potentially divisive disagreement. Such a deflection, we have noticed,<sup>45</sup> must have as its premise that questions of compliance with the procedure are an order of magnitude less open to reasonable public disagreement than are the ground-level questions themselves, or at any rate are that much more amenable to trusted

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<sup>45</sup> See above para 17.

institutional resolution. Any substantive content in the procedure must accordingly be kept sufficiently thin or abstract to avoid foreclosures of matters of grave moral moment on which agreement does not yet exist throughout the population of reasonable citizens. To that end, in the view of Rawls, the list of substantive essentials for a legitimation-worthy constitution is to be short and its items cast at accommodating levels of abstraction.<sup>46</sup> The strategy is of one of postponement of unity-breaking disagreement to beyond the moment of assessment of the legal constitution's legitimation-worthiness.

Thus, while a legitimation-bearing constitution may have to say *something* in the way of substantive guarantees, it cannot possibly, at any point in time, prescribe for everything that might indeed be a true requirement of human right—so long, that is, as you accept also that what is or is not a true requirement is sometimes open to reasonable disagreement. Even with such a seemingly obvious matter as liberty of conscience, there will be limits on what the constitution can say and in how much concrete detail. The boundaries will vary and shift from country to country and from time to time.

How, if at all, ought these considerations bear on how you will cast your vote on the gay-marriage amendment?

26. To that perhaps not-so-welcome question you might think of this possible retort: The reason the rhetorical question insinuates for a possible “no” vote on the same-sex marriage amendment is a reason, you might say, of expediency—that is, to accommodate demands coming from others whose cooperation you urgently need—and not of rightness. And considerations of expediency cannot affect your vote where rightness, in your considered judgment, points clearly in favor of “yes.”

A follower of Rawls would have, I think, a two-step response. First, what is up for decision here is not the state of the everyday law that immediately governs the question of gay marriage. Rather it is the state of *basic* law, the law that sets the terms for valid lawmaking. Second, when it comes to *basic* laws, the relevant considerations of rightness and expediency do not line up as simple opposites in the way your retort supposes.

When voting on a constitutional amendment, what is at stake, if you follow the Rawlsian argument, is something different—some might say it is something “larger”—than gay-marriage

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<sup>46</sup> See RAWLS, *LIBERALISM*, *supra* n. 12, at 232 (“The principled expression of higher law is to be widely supported,” and so “it is best not to burden it with many details and qualifications.”); *id.* at 296 (“Whenever we enlarge the list of basic liberties we risk . . . recreating within the scheme of liberties the indeterminate and unguided balancing problem we had hoped to avoid by a suitably circumscribed notion of priority.”).

policy or free-speech (or whatever) policy. It is the legitimation-worthiness of the resulting constitution. And when it comes to catering for a constitution's legitimation-worthiness, prudential and moral considerations are not opposable in the way your retort takes for granted. That is because a failure of political justification at the system level—or so it may be contended—is not a merely prudential or pragmatic mishap but a moral mishap as well.

Why so? Because such a failure strips a country's citizens of recourse to reasons that everyone should find acceptable for a mutuality of expectations of a prevailing regularity of compliance with that country's laws by everyone. It seems that should not be a morally tolerable outcome for a people who claim to prize each person's free development and exercise of his or her moral and other capacities, and on that very ground to find a moral necessity *both* in the support of civil government and the force of legitimate law *and* in the creation of (in Rawls's words) "a social world in which [all], as free and equal, can cooperate with others on terms all can accept."<sup>47</sup> It seems a pursuit of that latter condition must be a part what we owe to each other as a matter of basic recognition and respect. And then that, too—that moral duty of *civility*, as John Rawls calls it,<sup>48</sup> that obligation of respect toward disagreeing fellow citizens as presumptively free and equal, reasonable and rational—must itself qualify as a part of the background morality against which constitutions are to be rated as morally better and worse.

Attribution to basic laws of the justificational function thus goes hand in hand with the idea of a moral obligation of civility. Of course the cluster of values here coming to the fore—moral powers, recognition, fair terms, reciprocity, civility, reasonability—are of the sort that John Rawls would classify as "political," not "metaphysical" or "comprehensive." But this classification does not make them less than full-fledged moral values. It rather makes them moral values of a special kind (Rawls speaks of the "the very great values" of the political"<sup>49</sup>)—and indeed of a kind that takes on, in a Rawlsian view, a leading and in some ways a controlling role in any conception of justice for a modern pluralistic state.

Like it or not, that is what political-liberal reliance on the constitution for a justificational service seemingly must come to. From which it inexorably follows, disturbing as the thought may be, that, for any country in conditions of reasonable pluralism, its constitution almost certainly cannot rightly, at any point in time, prescribe directly for everything that is indeed (when the right answer is finally at hand) a true requirement of human right.

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<sup>47</sup> RAWLS, LIBERALISM, *supra* n. 12, at 50.

<sup>48</sup> See *id.* at 217-18, 226, 236, 242, 253; RAWLS, RESTATEMENT, *supra* n. 22, at 90, 92, 118.

<sup>49</sup> RAWLS, LIBERALISM, *supra* n. 12, at 139.

### A puzzle of judicial constitutional interpretation

27. If (para 25) the strategy of legitimation-by-constitution is of one of postponement of unity-breaking disagreement to beyond the crucial moment of assessment of the legal constitution's legitimation-worthiness, the price is that the resulting thin or abstract body of substantive constitutional law cannot be self-applying. Its applications must often be subject to reasonable debate, and that is why we need the Supreme Court. So suppose, now, the case posed in para 24, except that the questions come as matters of application by the Court of the constitution as it stands, *sans* amendment. The county clerk has turned away the same-sex couple; the couple have sued for relief on constitutional grounds, and the matter is now before the Supreme Court to decide.

Consider now this pairing of two statements by Rawls:

(1) “[C]onstitutional democracy is dualist: It distinguishes . . . the higher law of the people from the ordinary law of legislative bodies. . . . A supreme court fits into the idea of dualist constitutional democracy as one of the institutional devices to protect the higher law . . . [as long as] its decisions reasonably accord with the constitution” as laid down by the people.<sup>50</sup>

(2) “The justices [interpreting the constitution] . . . must appeal to the political values they think belong to the most reasonable understanding of the public conception . . . . These are values they believe in good faith . . . that all citizens as reasonable and rational might reasonably be expected to endorse.”<sup>51</sup>

These two remarks appear to sort nicely with our functions of regulation and justification (para 22); they do not, however, seem to be pointing in the same direction.

28. Where constitutional law is to serve as the medium of fixation by the authors (as we say, the people) of certain general aims regarding future political outcomes, the corresponding assignment to judicial appliers must be, as Rawls says in the first of our paired remarks, to “protect” the work of the authors. We must then expect from these appliers their best effort at extracting from the words and surrounding facts the historically enacted will of the authors.

That authorial will may of course move on a moderately abstract plane of principle. Say, it would be a will to condition the validity of any later-arriving law on its due deference to a principle envisaged and named by the authors as “the freedom of speech”—and so further on that later law's deference to whatever *that* principle—*their* principle—may turn out to encompass in future applications not expressly considered by them, in social conditions perhaps not foreseen by them. The task, though, must still remain one of historical-factual inquiry into what *the authors* envisaged as the gist and content of the principle thus named.

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<sup>50</sup> Id. at 233-34.

<sup>51</sup> Id. at 236.

Now, we know from experience that inquiries of that kind will quite frequently run out before they have turned up decisive answers either way to current controversies over the political-moral merits of various legal acts. Where they do, Rawls's court-as-protective-device proposition does not, just standing on its own, give the judges in a democracy a foothold for ruling against the choices (packed with their own express or implied constitutional interpretations) of the state's executive and legislative authorities. Or so the case has appeared to many.<sup>52</sup>

29. By seeming contrast, where the constraints of constitutional law are to supply sufficient justification *now* for willing submission by dissenters to the coercions of ordinary law—the second of our paired statements by Rawls—the corresponding assignment to judicial appliers must be (within some outer limit of current semantic defensibility) to enforce a set of constitutional essentials that *really does* supply the needed justification. As to what “really does” supply it, though, the judges will be at least in some degree on their own, as no one has better shown than Ronald Dworkin.

30. As persuasively explained by Dworkin, any truly respectful applier of a constitutional text will read the words against a backdrop of the authors' own supposed conception of the political-moral “upshot or point” of writing a basic-law constitution in the first place. A political community's commitment to such a document with its particular provisions necessarily reflects their “*prior* commitment to certain principles of political justice which, if we are to act responsibly, must therefore be reflected” in the way we now read the Constitution. A reader, Dworkin says, cannot truly show regard for either a constitutional text or “the motives of those who made it” without ascribing *to them* certain “principles of political morality which in some way represent the upshot or point of constitutional practice more broadly conceived.”<sup>53</sup>

Yet it seems also that any conception of “upshot or point” ascribed to authors by a respectful interpreter will have to be one that makes good sense *to the interpreter*. The interpreter “proposes value for the practice by ascribing some scheme of interests or goals or principles the practice can be said to serve or exemplify.” But plausibly defensible ascriptions will differ among interpreters, so any interpreter's choice will have to reflect his or her own

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<sup>52</sup> See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

<sup>53</sup> RONALD DWORKIN, *A MATTER OF PRINCIPLE* 35-36 (1985). Dworkin soon thereafter would generalize the point beyond its application to “constitutional practice” to the larger social practice known as “law.” See RONALD DWORKIN, *LAW'S EMPIRE* 87 (1986) (“Law is an interpretive concept. . . . Judges normally recognize a duty to continue . . . the practice they have joined.”); *id.* at 66 (“[T]here must be an interpretive stage at which the interpreter settles on some general justification for the practice . . . . This will consist of an argument about why a practice of that general shape is worth pursuing.”).

view of which ascription “proposes the most value for the practice—which one shows it in the better light, all things considered.”<sup>54</sup>

Suppose now a political-liberal-minded judge, who finds that the “upshot or point” of constitutionalization of substantive norms is to ensure justification—not just on the day the text is written but over some future course of political time, while that constitution remains in place—for calls among fellow citizens for willing submission to laws with which some of them may disagree profoundly.<sup>55</sup> Then (passing now from Dworkin back to Rawls), today’s judicial appliers must read and apply the words (again, the second of our paired remarks of Rawls on constitutional interpretation) in the light of “political values . . . that *they [the judges] believe, in good faith . . . all citizens as reasonable and rational might reasonably be expected to endorse.*”<sup>56</sup> The legal text will not be disregarded, but it will be read against the backdrop of a political-moral purpose that the judicial reader cannot simply find already *in* the text (because it indispensably informs the reading of the text) and so must of necessity bring to it.

31. It seems, then, that between the regulatory and the justificational modes of constitutional application there must always remain some gap of difference in the questions presented to the applier. Alessandro Ferrara has put it crisply: “In . . . the first mode the interpreter of the constitution is asked to tell the public what the sovereign people *did* will, in the second to tell us what it *should* will.”<sup>57</sup> If we are lucky with our historical contingencies—if our finding of what the people did will matches our view of what they should will—that gap will not matter in practice. Apply the constitution, then, for the sake of regulation in accordance with the authors’ directions, and you will also *ipso facto* apply it with regime-justifying effect.

A classic case, that, of a Levinsonian happy ending!<sup>58</sup> It follows where the constitutional authors happen to have constitutionalized all the principles whose observance is required to make a democratically and liberally justifiable regime—and none that would defeat it. And what

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<sup>54</sup> Id. at 52-53

<sup>55</sup> Compare RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 24-26 (1996), where Dworkin, for his own part, proposes as the point of substantive constitutional law the establishment of basic-structural conditions for imbuing all citizens with a warranted sense of full “moral membership” in the collectively self-governing political community, by which each can “treat himself as bound together with others in a joint effort to resolve [political] question, even when his views lose.” Dworkin, if I read him right, points straight at a justificational function for substantive constitutional law.

<sup>56</sup> RAWLS, *LIBERALISM*, *supra* n. 20, at 236 (emphasis supplied).

<sup>57</sup> Alessandro Ferrara, *Political liberalism revisited: A paradigm for liberal democracy in the 21st century*, 24 *PHIL. & SOC. CRIT* 681, 686 (2016).

<sup>58</sup> See Colloquy, *Fidelity as Integrity*, 65 *FORDHAM L. REV.* 1357, 1358 (1997) (statement of Sanford Levinson).

if (in your or my liberal-minded estimation) they have not? Or rather—the more deeply worrisome question—what if our condition of reasonable pluralism blocks us from agreement on whether they did, and, if so, to what effect?

Does the combination of “liberty,” “equal protection,” “ free exercise,” and “no establishment” add up to a ban against exclusion of same-sex couples from state-sanctioned marriage plus making county clerks choose between keeping their jobs and abstaining from endorsement of gay marriages? Either answer to Ferrara’s “did will” question still leaves for answering the question whether the resulting constitution is legitimation-worthy. Either answer to the “should will” question still leaves for answering the question whether that is what they did will. The two questions simply and incurably are different. Not only different, independent. No logic supplies an inference from the answer you give to one to the answer you give to the other.<sup>59</sup>

32. Piling the justificational function on top of the regulatory thus leaves interpreters caught betwixt and between. This result chimes easily with the interminable American debate between textualist/originalist and “philosophical” or “moral reading” approaches to judicial constitutional interpretation.<sup>60</sup> (As interestingly, it chimes with an observation that not even our most avid moral readers can ever quite forswear the idea of a publicly legible fixture in time of the constitutional essentials.<sup>61</sup>) We simply read that debate (or that choice) through a justificational lens (as political liberalism proposes), but construing it as a contest between (i)

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<sup>59</sup> If prepared to face down another “happy ending” jeer, you might think of suggesting that history itself supplies the logical link, because what it shows over the long arc is that what the people in this blessed country of ours did and do will above all is a truly legitimation-worthy constitution and that judicial and other appliers should interpret accordingly. Philosophical-minded judges have been known to take that tack. See *United Mizrahi Bank Ltd. v. Migdal Coop. Vill.*, 49(4) P.D. 221 (1995), English translation at [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf), at 271-72 (Barak, President) (“By means of judicial review we are loyal to the fundamental values that we took upon ourselves in the past, that reflect our essence in the present, and that will direct our national development as a society in the future.”)

<sup>60</sup> See JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* 80-81 (2015) (“philosophic” approach); RONALD DWORKIN, *FREEDOM’S LAW* 1-3 (1996) (“moral reading”).

<sup>61</sup> James Fleming describes the philosophic approach as a mode of interpretation in which judges progressively “strive for the true meaning or best account” – of what? Not of what a Rawlsian justification-worthy constitution hypothetically *should* say, but rather of what “our” constitution *does* say – if sometimes only somewhat broadly and abstractly – to wit, “our . . . ends-dedicated scheme of . . . rights phrased more often than not as referring to general goods and principles.” The philosophical approach, Fleming says, “does not involve judges or other interpreters in doing moral and political philosophy without regard to the commitments of our constitutional order.” *Id.* Or compare this restatement of Fleming’s view offered by Jack Balkin: Constitutional words and sentences “bear an implicit moral or political logic, and so constitutional interpreters should read them “as examples or instantiations of a prior or more general moral or political theory that underlies the Constitution.” ” Jack M. Balkin, *History, Rights, and the Moral Reading*, 96 B.U. L. REV. 1425, 1434-35 (2016).

the formal-democratic view that a true historical fact of effective higher-law enactment by the people (with whatever in the way of substantive higher law the people may or may not have seen fit to lay down) suffices to justify the daily force of conforming ordinary law, and (ii) the view that justification depends on a further, substantive assessment of the legitimation-worthiness of the higher law in force.

#### A puzzle of closure versus openness of the constitutional essentials

33. Suppose we join with Rawls in taking up stance (ii). And now please look again at the paired statements from Rawls in para 27, above. Are we not still caught betwixt and between the “protect the people’s higher law” view (1) and the “political values they think right” view (2)?

Justificational force, we said above,<sup>62</sup> presupposes regulatory effect. Justification says: “*So long as* the legal system in force requires and assures that legislative majorities will uphold *these* norms—pointing by “these” to the scriptural constitution, the basic law—the system should in all reason be found acceptable among free and equal citizens, and so we may all justifiably insist on each other’s compliance with the laws that duly issue from the system. But that “so long as”—so the argument will run—sends us right back to the regulatory function of substantive constitutional law. The county clerk and her sympathizers seek to know *now* whether the system is or is not one that gives her assurance that, come next week or next year, she will be able to send same-sex marriage-seekers to the next window or the next county and still retain her post. They already have their settled convictions about what a legitimation-worthy constitution *would* say about that matter, what they need further to know (in order to know whether the force of ordinary law is justified in accord with the Rawlsian principle of legitimacy) is what “this” constitution does say. A legitimation-bearing body of constitution law cannot be a pig in a poke.

34. Okay, a legitimation-bearing body of constitutional law cannot be pig in a poke. And yet it has to be, by Rawls’s constitution-centered proposition on legitimacy. In order for adherence to a legitimation-worthy set of constitutional essentials to serve as a procedure for getting past intractable divisions of substance, it seems those essentials must at all times be framed in terms sufficiently open to leave many divisive questions of applications presently unresolved, postponed to some indefinite future resolution.<sup>63</sup> That requirement of openness holds not just during some initial sign-up period, while citizens reason their ways toward

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<sup>62</sup> In para 23.

<sup>63</sup> See above paras 15, 25.

agreement that they and others can reasonably stake their freedom and equality on a system forever bound by the scripted set of constitutional essentials. The requirement of openness holds continuously throughout a free society's unfolding future course of generational successions, social learning, and new conditions disclosing new issues of application or casting old one in a new light. (This is what Rawls means by positing a "fact" of reasonable pluralism, presenting a (permanent) "problem" of political liberalism.<sup>64</sup>) *Always* either postponed or re-openable must be excessively divisive applications—we are not talking minor details, here—that you and I and county-clerk sympathizers will care deeply about. So it must be the case, for Rawls, that at any moment there will be questions of application for which either a "yes" or a "no" answer will be "in accordance with" with the constitutional essentials. But then (the question from para 33) how can the scripted constitutional essentials possibly stand as the country's public contract (so to speak) on legitimacy?

## V. REREADING RAWLS

35. Rawls now looks like wanting to have it both ways: The constitutional essentials both cannot be and must be a pig in a poke. That's so, you might well respond, but only because I have been reading Rawls to make legitimacy depend on an assurance that legal officials will reach, at every step, singularly right answers to questions of application of a scripturally formulated scheme of constitutional essentials. But Rawls never says that. He says legitimacy subsists as long as coercive political power is exercised "in accordance with" a legitimation-worthy set of constitutional essentials. Now, who says "in accordance with" has to mean "without getting applications wrong"?

But if Rawls does not mean that, what else might he mean? He might mean that applications are conducted by those entrusted to conduct them in a manner that is observably competent and sincere, open and fair, with due regard for the scripted rights and principles but also with a controlling eye always to the question of ultimate import: to wit, whether the resulting basic-law system remains as one that reasonable and rational citizens can find acceptable in the circumstances (and here please revert to the remarks on "reasonable" in para 12, above).

What then finally matters will be the spirit or ethos with which applications of the constitutional essentials are conducted, not the getting of them Herculeanly "right." That some

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<sup>64</sup> See RAWLS, *LIBERALISM*, *supra* n. 12, at xviii-xix, 4, 36-37 ("Political liberalism assumes that . . . a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of free institutions of a constitutional democratic regime."); above para 9.

applications that you or I or county-clerk sympathizers may care deeply about remain unresolved for the moment does not prevent a present favorable judgment of that spirit or ethos, and neither does the occurrence of a resolution we oppose prevent a favorable judgment on the record as a whole. The scripturally listed “equal basic rights and liberties of citizenship that legislative majorities are to protect”—a/k/a “constitutional essentials”—are to serve, then, not as the rigid terms of a fragile contract but rather as discursive guidelines, settled anchoring points for a constitutional public reason aimed finally at the protection, not of a legal contract, but of an overall legitimate political practice according to the standard set by Rawls: acceptable to free and equal, reasonable and rational citizens.<sup>65</sup>

36. A perception of need to clarify this point may be a part of what led Rawls to offer, in a writing that apparently postdates his prior formulations of a “liberal principle of legitimacy” (the ones I have been working with throughout), a formulation that by its parallel structure seems meant to replace them. Rawls called it by a new name, “the idea of political legitimacy based on the criterion of reciprocity.” It says:

Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons. This criterion applies on two levels: one is to the constitutional structure itself, the other is to particular statutes and laws enacted in accordance with that structure. To be reasonable, political conceptions must justify only constitutions that satisfy this principle.<sup>66</sup>

Such a revisionist reading of Rawls—replacement of legal assurance of outcomes by assurance of a prevalence of public reason, at the load-bearing position in systemic political justification—does no doubt run into all the contrary tending remarks and positions that I have been pointing to above.<sup>67</sup> (It leaves Rawls’s case for excluding the pursuit of background justice from the constitutional essentials gravely weakened if not without a leg to stand on.<sup>68</sup>) The spirit of Ronald Dworkin is here to remind us that such interpretative contretemps do not necessarily

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<sup>65</sup> Compare ALESSANDRO FERRARA, *THE DEMOCRATIC HORIZON: HYPERPLURALISM AND THE RENEWAL OF POLITICAL LIBERALISM* 48-51 (2014) (proposing treatment of established liberal “fundamental rights” not as “normative stumbling blocks that political will cannot ignore without forfeiting its legitimacy,” but rather “a moment of closure that an open-ended political will freely creates for the sake of better preserving the openness of the political process”).

<sup>66</sup> Rawls, *Public Reason*, *supra* n. 6, at 771. This formulation certainly postdates the ones in RAWLS, *LIBERALISM*, *supra* n. 12, and probably also postdate the one in RAWLS, *RESTATEMENT*, *supra* n. 22, published in 2001. See *id.* at xii (editor’s remark that “by 1989 the manuscript had evolved into something close to its present form”). I owe this observation to correspondence with Silje Langvatn

<sup>67</sup> See above paras 17-19, 33-34.

<sup>68</sup> See below para 39.

make it not the best reading overall. Any Herculean reader of Rawls—yes, even of Rawls—will have to shoulder the burden of casting off some parts of the record as (ahem) “mistakes.”<sup>69</sup>

36. So what, then, would be the putative mistake? “Seeming to pin legitimacy too strongly to full and correct enforcement of a constitutional-legal contract” would approximately describe the one I am have been after. But still we have to assign *some* work, *some* function to those “constitutional essentials,” and reducing them, as I have suggested to anchoring points for constitutional public reason, may still leave us with a problem.

Why, after all, these particular anchoring points? The moral work they do must still be in service to *some* conception—some *distinct*, some *fixed* conception, thinned out as it may be—of the non-controvertible basics of government practice here that any legitimation-worthy constitution, by Rawls’s later reciprocity-based formulation, still must “satisfy.” Silje Langvatn (to whose work I stand much indebted for the idea of the re-reading) does herself read Rawlsian political reciprocity as a distinctly liberal-tintured idea. As judge, as official, as citizen, my votes on matters of basic justice and constitutional essentials are to be in accord with that I sincerely hold to be “a reasonable and sufficiently complete interpretation of the basic political-moral ideas of the public political culture of constitutional democracies,” which include “the idea of having a constitution that protects a set of liberties for each.” My aim in such cases is always to be “to interpret, specify, and give institutional effect to the basic political-moral ideas” of an extant regime *supposedly of that type*, in the face of disagreements about “how to best combine and translate [these political-moral ideas] into specific legal and institutional arrangements.”<sup>70</sup>

37. Do we thus invite in by the back door the worry this whole story starts out from, about taking pluralism seriously?<sup>71</sup> Alessandro Ferrara has named as a fact of “hyperpluralism” in the societies we deal with those clashes of faith and culture that seem to thin out to the point of evaporation any prospect for agreement on a set of substantively liberal-tending constitutional essentials.<sup>72</sup> As a possible response, Ferrara suggests, not an abandonment of the liberal constitutional essentials, but a further inclusion in an affected country’s basic-structural

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<sup>69</sup> See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 118-23 (1977) (on the need of Hercules, J., for a “theory of mistakes”); cf. Langvatn, *supra* n. 33, at 133 (“[I]n many of Rawls’ texts ‘superseded thoughts appear to be retained along with later ideas’, and in some early texts Rawls hints at ideas that he develops only much later” (quoting Gerald Gaus, *The Turn to a Political Liberalism*, in A COMPANION TO RAWLS 233, \_\_ (J. Mandle & D. Reidy, eds., 2014)).

<sup>70</sup> Langvatn, *supra* n. 33, at 142-43.

<sup>71</sup> See para 9, above.

<sup>72</sup> See FERRARA, *supra* n. 65 at 89-91.

arrangements of certain additional components to ease the pressures for substantive agreement: provisions for legislative devolution (federalism, bi-nationalism) or for institutionalized legal pluralism within a unitary state. In this response, some will see a surrender of liberalism, other a surrender of the hope for a conquest on liberal terms of the problem posed by the inevitable appearance within a liberally free society of non-liberal and counter-liberal views, deeply and sincerely held. Ferrara includes a proviso: “The norms produced through autonomous processes [may] not enter outright conflict with the central constitutional essentials.”<sup>73</sup> We may be left uneasy, but Ferrara calls this “the best response to the tenuousness of consensus and the ubiquity of dissent that political liberalism can offer.”<sup>74</sup>

## VI. TAKING STOCK

38. We have noticed a number of hangups or dilemmas connected to what I called, at the very start, “John Rawls’s seeming placement of constitutional law at the load-bearing center of his proposed ‘liberal principle of legitimacy’”—or, in other words, that principle’s seeming reduction of the requisite founding terms of a liberally legitimation-worthy political practice to a body of institutionally enforced constitutional law—and a resultant cumulative assignment to constitutional law of both regulatory and justificational burdens. Those hangups include:

- (a) a self-denying exclusion from those founding terms of a commitment to the ongoing pursuit of background justice (paras 17-19);
- (b) a moral dilemma for citizens caught between convictions of substantive justice (“human rights”) and obligations of civility, when facing questions of constitutional-legal content and revision (paras 24-26);
- (c) a dilemma of office for constitutional interpreters caught between assignments to protect the higher law laid down by the people and to render that law in a legitimation-worthy condition (paras 30-32);
- (d) a collision of demands both for openness and closure in the presently legible prescriptive content of the constitutional essentials (paras 33-34); and
- (e) a pressure to forgo the liberal constitutional essentials, even as settled starting points for public reasoning on matters of constitutional moment and basic justice (para 37).

39. Assuming always a place for central liberal constitutional essentials in a systemic justification procedure, we have noticed (para 35) a difference between a treatment of them as

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<sup>73</sup> Id. at 108.

<sup>74</sup> See id. at 106-08

laws that fail of their justificational purpose when appliers fail in the end to get them “right,” and a treatment of them as settled starting points for public reasoning on matters affecting justice at a basic-structural level. We have construed the late-coming proposal by Rawls for “an idea of political legitimacy based on the criterion of reciprocity” (in place of the “the liberal principle of legitimacy”?) as a move away from the former to the latter sort of conception (para 36).

We may accordingly ask: For which of our hangups does such a move provide relief. We have already offered (para 35) to explain the move as a response to hangup (d). The move provides relief as well for hangup (a): Rawls’s case for exclusion of a background-justice commitment from the set of legitimation-bearing constitutional essentials depends entirely (as I have argued) on the idea that the essentials are all and only *laws* that the public can expect the Supreme Court more or less fully to police and enforce. A conception of the essentials as mandatory considerations, in any and all of the Court’s constitutional-legal applications to which they may pertain, seems to fit quite nicely with Sager’s proposition that *sometimes* a background-justice essential will make a decisive difference in the Court’s exercise of its strictly judicial powers and remedies in undoubtedly justiciable cases (as in the example offered above at para 6).

40. I have not yet seen how a move to that conception can help with hangups (b), (c), and (e). Relief from them would require, as far as I am able to see right now, one or two further retractions from a constitution-centered legitimacy test. Political liberalism might have to give up the call for any mandatory substantive content *at all* in its stipulation for “the system” that is to bear the justificatory load—the system, that is, on the perceived legitimation-worthiness of which will depend the moral justification for a reciprocity of demands for respectful submission to laws issuing from it. Or political liberalism might have to give up the entire idea of a publicly agreed and publicly certifiable legitimacy test, which citizens can cite to one another as justification for reciprocal expectations of compliance with law;<sup>75</sup> thus leaving legitimacy as (i) a question that each faces and decides for himself or herself, by considering from time to time whether the country’s overall political practice (which might or might not include a body of substantive constitutional law) meets the demand of civility among citizens sharing the perceptions of political reasonableness I sketched above in para 12; (ii) a responsibility, then, for each to shoulder each and every time she deploys a modicum of power on one or the other side of a fairly disputed matter of basic-structural justice; and (iii) a

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<sup>75</sup> See above paras 11, 15.

contingency, then, of a due and evident shouldering of that responsibility by a critical mass of citizens and officials. I do not here take up the question of whether those are concessions that a political liberalism can make.